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MISCELLANY.

DOCTRINE OF LOST GRANT.—The law has always recognized the necessity of allowing the acquisition of an easement by long continued use. At first, immemorial use was held to be necessary and the coronation of Richard I. was taken as the limit of legal memory. See *Angus v. Dalton*, 3 Q. B. D. 85. This unsatisfactory rule was later modified by the doctrine of lost grant. By this doctrine all easements are supposed to arise in grant, but if the easement has been used for the period required by the statute of limitations to gain a title to lands by adverse possession, then the use is presumed to have commenced under a valid grant which has since been lost. See *Angus v. Dalton*, *supra*. This theory has been a source of considerable confusion in the law, for many courts have treated the lost grant as though it were to some extent a grant in fact. Thus in a recent Virginia decision the court held that the presumption of a grant to the plaintiff of a right of way over the defendant's land might be rebutted by showing that the defendant continually protested against the plaintiff's use, and therefore never acquiesced in it. *Reed v. Garnett*, 43 S. E. Rep. 182.* If the lost grant is considered as a grant in fact, such evidence may well show that no such grant was ever made. But the lost grant is admittedly a fiction, and to be of any value should be treated purely as a presumption of law. *Tracy v. Atherton*, 36 Vt. 503; *Reimer v. Stuber*, 20 Pa. St. 458.

The court in the principal case states that for the acquisition of a right by prescription it is necessary to show the servient owner's acquiescence. The great majority of the cases also use this word as describing one of the necessary ingredients of prescription. *Rooker v. Perkins*, 14 Wis. 79. But by the weight of authority no greater acquiescence is necessary than in the analogous cases where title to land is acquired by adverse possession. In short, the servient owner must be deemed to acquiesce if he remains inert when he knows of the plaintiff's claim and could prevent the acquisition of the right. *Daniel v. North*, 11 East, 372; *Webb v. Bird*, 13 C. B. N. S. 841; *Treadwell v. Inslee*, 120 N. Y. 458. It is difficult to see how acquiescence could be regarded as containing an affirmative element without becoming practically equivalent to permission. Though permission would be most consistent and most in harmony with the theory of an actual lost grant, yet it is well established that use of an easement by the permission of the servient owner will never ripen into a legal right. *Pierce v. Selleck*, 18 Conn. 321; *Esling v. Williams*, 10 Pa. St. 126.

There is some authority to support the principal case on the ground that verbal objection constitutes a sufficient interruption of the easement to prevent the gaining of a legal right. *Powell v. Bagg*, 74 Mass. 441. These cases go on the theory that a slight interruption should be sufficient to rebut the presumption of a grant. But this is opposed by the weight of authority which requires an actual interruption by the servient owner either through the commission of some suable act or through an action carried to a successful issue. *Kimball v. Ladd*, 42 Vt. 747; *Lehigh etc. Co. v. McFarlan*, 43 N. J. Law 605. These cases seem correct, since

* Reported in full, with editorial comment, *ante* p. 723.

if verbal objections amounted to interruptions the acquisition of any prescriptive rights would be well-nigh impossible.

Many courts have abandoned the doctrine of lost grant, and hold that rights by prescription are acquired strictly on the analogy to the acquisition of title under the statute of limitations. *Mueller v. Fruen*, 36 Minn. 273; *Okeson v. Patterson*, 29 Pa. St. 22. Such a rule has the merit not only of attaining fairer results, but also of being based upon fact rather than upon fiction.—*Harvard Law Review*.

SUPERVISION OF DIVORCE ACTIONS IN THE PUBLIC INTEREST.—The decision of the Supreme Court of the United States in *Andrews v. Andrews*, 23 Sup. Ct. 237 (see editorial in this journal for February 9, 1903), emphasized anew the supervisory function which the courts will exercise in the interest of public morality over actions for divorce. The policy was very distinctly laid down that a temporary domicile for divorce purposes only will not be respected and that to such end the courts will look beneath the surface of things, disregarding even such a fact as that the plaintiff had voted at an election at his temporary domicile, and will inquire whether the intention was to evade the law of the actual domicile. The consideration was insisted on that the public is always potentially a third party, and that, as divorces may not be granted directly on the consent of parties, they should not be countenanced by consent through the subterfuge of seeking a more available foreign forum.

The decision of the Appellate Division of the New York Supreme Court in *Burch v. Burch*, printed on the first page to-day, is one of a number of recent decisions in our own courts showing that judicial supervision in the public interest is not being relaxed, but, if anything, extended. This case did not involve the public consideration most commonly arising in controversies in the local courts—the question of collusion—but the adequacy of the evidence as a ground for divorce where the opposition was veritable and serious. The Appellate Court reverses the action of the referee and the Special Term and holds that the alleged adultery was not sufficiently proven. We have read the record in this case and are of opinion that the Appellate Division was amply justified in applying the principles laid down in *Moller v. Moller* (115 N. Y. 466); *Smith v. Smith* (89 Hun. 610); *Fanning v. Fanning* (2 Misc. 90); *Davis v. Davis* (4 Misc. 454); *Conway v. Conway* (37 Misc. 414).

We think the courts have sometimes gone too far in condemnation of particular classes of witness, such as detectives. The question should always be treated as one arising on the whole case, viewing the testimony of each witness with regard to his particular temptation to lie or exaggerate, and the "divorce should not be granted without evidence which is, after careful scrutiny, satisfactory and can command the confidence of a careful, prudent and cautious judge." (See cases above cited, and, with a contrary result, *McCarthy v. McCarthy*, 143 N. Y. 235; *Winston v. Winston*, 34 App. Div. 460).

It is very important that referees in divorce cases should realize the gravity of the public function resting upon them. They see and hear the witnesses, and their judgment is more valuable than that of a court can be as to questions of veracity and probability. It is undoubtedly the fact that under the present system appearances for the defense are frequently made for the sake of obtaining a

reference, in cases which would have been permitted to go by default if that course did not entail a public hearing in court. It is not necessarily a badge of collusion that a defendant appears and serves an unverified answer denying the allegations of the complaint, but this situation always calls for careful scrutiny. Of course, collusion to be legally objectionable must extend to the commission of the offense relied on, and does not consist in mere facilitation of proceedings or even furnishing evidence. A divorce may be granted upon confessions of the defendant if they are sufficiently corroborated to avoid just suspicion of collusion (*Madge v. Madge*, 42 Hun. 524). But, under such circumstances, the corroboration must be by strong independent evidence. Reliance upon confessions would seem to suggest the probability of collusion, which must be satisfactorily eliminated, and referees and the court are justified in viewing with distrust systematic willingness and officious co-operation on the part of defendant.

A proposition of the late Judge Beekman may be recalled for the creation of a public officer to perform the duties imposed upon the King's Proctor in England. It would be his function to appear directly for the public in divorce cases, investigate them out of court with reference to collusion, and make such opposition as he deems proper under the circumstances. There is much to be said in favor of having this function discharged by an independent advocate rather than by a referee or judge, who must act in the public interest more or less according to the presence or absence of mere suspicion. Under the existing conditions of practice in this city there is almost as great need of special counsel for the State in actions in which the defendant appears as in those which go by default.—*New York Law Journal*.

DEVISES TO CHARITABLE USES—WHAT IS A PUBLIC CHARITY?—Who may be the beneficiaries under a devise or gift to charitable uses? The element of the greatest difficulty in the definition of a charitable use is presented in the question whether the donor or devisor has directed his intention toward proper objects of charity. Said Sir William Grant in *Morice v. Bishop of Durham* (1804), 9 Ves. 405: "Those purposes are considered charitable which are enumerated in 43 Eliz. (1601), or which, by analogies, are deemed within its spirit and intentment." Courts have invariably had reference to the preamble of this Statute of Charitable Uses in efforts to formulate a satisfactory definition of the term. Sir William Grant's concise statement was elaborated by Mr. Justice Story in his decision of the case of *Jackson v. Phillips* (1867), 14 Allen, 539, 556, as follows: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government."

The requirement of "an indefinite number of persons" and the inclusive clause, "or otherwise lessening the burdens of government," are at once suggestive of the public feature of the charitable use or public charity. How indefinite must the beneficiaries be? May the creator of the public charity designate a

*See *ante* p. 280.

class, artificially limited, for example, by social, fraternal, or religious affiliations, but still vague in numbers, or must his benefaction be open to the public in the broad, lay meaning of the word, such that the State is under an obligation to establish and maintain? The Supreme Court of Kansas has recently adopted the latter view, after having had under consideration for over a year a devise in fee to trustees "to provide a home and industrial school for the orphan children of deceased Odd Fellows of the State of Kansas," the decision being a reversal, upon reargument, of a prior decision in the same court. (1901) 64 Pac. 33. *Troutman et al. v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n.* (1903), 71 Pac. 286. The devise was held not to create a public charity and void as violating the rule against perpetuities. The decision turned upon the definition of "public charity."

Two of the purposes of charitable uses laid down in terms in the statute of 43 Eliz. are contemplated by the devise in the principal case, namely, "for schools of learning" and for "education and preferment of orphans." Donations for the establishment of schools are strongly favored by the courts in dealing with public charities, limitations to a particular community or to some class forming a part of it, indefinite and vague as to numbers and individuals, being considered no obstacle, *Attorney General v. Lonsdale* (1827), 1 Sim. 109; and more especially is this true of schools for the education of orphans and poor scholars. *Vidal et al. v. The Mayor, &c., of Philadelphia* (1844), 2 How. 127; *Episcopal Academy v. Philadelphia* (1892), 150 Pa. 565; *People ex rel. Ellert v. Cogswell et al.* (1896), 113 Cal. 129.

The impossibility of fixing an exact meaning to the word "public" has long been recognized. The word is generally taken to be descriptive of the nature of the charity and not by way of distinguishing one charity from another. *Attorney General v. Pearce* (1740), 2 Atk. 88. As a matter of course, all charities cannot be universal and need not be. *Indianapolis v. Grand Master, etc.* (1865), 25 Ind. 518; *City of Petersburg v. Benevolent Ass'n* (1884), 78 Va. 431. Both of these cases came up on a question of exemption from taxation, being tested by rules of strict construction; the devises were for the benefit of classes, strictly limited to the particular society, but vague and indefinite as to individuals. The latter element appears to be the chief ingredient of the definition of a public charity in that large class of cases in which the validity of a devise, limiting the beneficiaries to a city, church, sex, association, fraternity or other definite classes of the whole public, has been questioned and established. *Attorney General v. Lonsdale* (*supra*), *Duke v. Fuller* (1838), 9 N. H. 536; *Preachers' Aid Society v. England* (1883), 106 Ill. 125; *Heiskell v. Chickasaw Lodge of Odd Fellows* (1889), 78 Tenn. 668; *Philadelphia v. Women's Christian Ass'n* (1889), 125 Pa. 572; *Guilfoil v. Arthur* (1895), 158 Ill. 600; *Estate of Willey* (1900), 128 Cal. 1. That no private or pecuniary return is reserved; that the benefit resulting from the gift goes to the public; that the beneficiaries are not a wholly existing class, capable of designation, make the trust public in character and sustain the devise. Where a charitable trust is capable of two constructions, one of which would make it void, and the other would render it effectual, the latter must be adopted, *Bruce v. Presbytery of Deer* (1867), L. R. 1 Sc. & Div. App. 96, and it is generally laid down that charitable trusts are favorites of the courts. Much confusion is caused by citing cases in which exemption from taxation is claimed on the ground of public

charity (*City of Philadelphia v. Masonic Home* (1894), 160 Pa. St. 572), as authorities for the definition of the term, public charity, or charitable trust, in its general significance; the term must be submitted to the test of conflicting canons of construction—strict in the former and liberal in the latter.

Nor is it one of the essentials to the establishment of a public charity that the power of visitation and control must be shown to be in the Attorney-General, representing the public. This is incident to and not a constituent of the institution. If, after the charity is established and is in process of administration, there is any abuse of the trust or misemployment of the funds, and there are no individuals having the right to come into court and maintain a bill, the Attorney-General, representing the sovereign power and the general public, may bring the subject before the court by bill or information, and obtain perfect redress for all abuses. It would seem that the word "public" is taken only to indicate the nature of the devise; that the first essential is vagueness and indefiniteness; that each case must be tested by very general rules, care being taken on the one hand that the devise is not too indefinite, and on the other that the devise does not amount to a legacy, and is free from the taint of selfishness, in every sense, or private gain.

The assumption, in the prevailing opinion of the principal case, that unless the devise is a public charity it is within the rule against perpetuities would seem to be founded upon a misconception of the common-law definition of the rule, which was one against the remote vesting of estates. Here the conveyance is of the fee simple, to vest immediately. Obviously there is no room for the operation of the rule. *City of Philadelphia v. Heirs of Girard* (1863), 45 Pa. St. 9. The result would be different were there in Kansas, as there is in New York and some other States, a statute substituting for the common-law rule against perpetuities the prohibition against the suspension of the power of alienation. Under such a statute a gift to trustees to hold for an unascertainable body of beneficiaries would permanently suspend the power of alienation.

The problem of chancery jurisdiction over anomalous gifts to uses—not private trusts for lack of definite beneficiaries, not charities, because confined to a class in the community—should not be impossible of solution in view of a very respectable array of authority to the effect that the testator's wishes will be effectuated, the trustees being willing, to the exclusion of the heirs and personal representatives. See "Failure of the Tilden Trust." 5 *Harvard Law Rev.* 389. —*Columbia Law Review.*

SUICIDE AS A CRIME—LIABILITY OF PERSON ASSISTING.—In *Grace v. State*, 69 S. W. 529 (Court of Criminal Appeals of Texas, June, 1902), the appellant was indicted for the murder of Mollie Lane by shooting her with a pistol. He was convicted of murder in the second degree. The prisoner had been criminally intimate with the deceased, who, in consequence of her shame, unsuccessfully attempted to take her life by taking poison. The deceased declared that, though she had not succeeded in this attempt, she would resort to other means; that she had made up her mind to take her life. Shortly afterwards on the same day the appellant came in, placed his pistol on a dresser and lay down on his bed in the room. The deceased and two others were present. After some conversation between the deceased and a Miss W., one of the others present, she, the deceased,

sprang up, saying she would end it all, seized the pistol, and immediately shot herself, dying instantly. As a matter of fact the jury found that the appellant placed the pistol on the dresser with the intention that the deceased should use it to take her own life.

The indictment was based on a statute which provided that if any one prepare means by which a person may injure himself, with intent that he shall thereby be injured, he shall by the use of such indirect means become a principal. On appeal this was very properly held to apply only where the victim is not cognizant of the intent of the accused in preparing the means for the destruction of his or her life. That it only applies where the victim is the innocent agent of the person providing such means, and not where the deceased acted of his or her own volition and with guilty knowledge.

Then the question arose as to whether the appellant was guilty at common law, and the decision of the court in this connection is not easily reconciled with reason and sound logic. It was held "not to be a violation of any law in Texas for a person to take his or her own life; that, so far as the law is concerned, the suicide is innocent; therefore the party who furnishes the means to the suicide must also be innocent of violating the law." Judgment was reversed.

Bishop on Criminal Law, sec. 1187, says: "The same principle which forbids one to take the life of another prohibits equally the taking of his own life. Therefore, self-murder, or suicide, like any other murder, is a common law felony. But as no penalty other than the forfeiture of goods, and of personalty generally, which was the common law punishment, 1 Hawkins P. C., C. 27, secs. 7, 8, can be inflicted on him who has murdered himself, and as forfeitures for crime are not practiced in our states, this offence is practically not punishable with us. *Com. v. Bowen*, 13 Mass. 356 (1816). It is the same where one kills another and dies; though he has committed murder, our law cannot punish him." It is to be noted that though suicide is not punishable it is none the less a crime; to hold otherwise would produce some very singular consequences. Suicide is not only a crime but it is a crime requiring an intent to kill. Take away the intent and you have the victim acting as the innocent agent of another, or of the instigator of the crime, and it is murder and not suicide. Such cases would fall directly within the Texas statute as interpreted in the case under discussion. But if suicide is not a crime, then how can you carry over the intent to commit suicide to other crimes actually committed? If suicide is not unlawful, as held in *Grace v. State*, then, had the deceased, in the attempt to kill herself, killed another, she would have been guilty of homicide. It would have been a mere accident.

Com. v. Mink 123 Mass. 422 (1877), is directly in point. Here the defendant in an attempt to kill herself accidentally killed another, who interfered to prevent the suicide. Gray, C. J., said the life of every human being is under the protection of the law, and cannot be lawfully taken by himself, or by another with his consent, except by legal authority. By the common law of England suicide was considered a crime against the laws of God and man. That one who persuades another to kill himself, and is present when he does so, is guilty of murder as a principal in the second degree. *Com. v. Bowen*, 13 Mass. 355 (1816). This case was affirmed in *Com. v. Dennis*, 105 Mass. 162 (1870). Thus, if two mutually agree to kill themselves together, and the means employed to produce death take effect upon only one, the survivor is guilty of the murder of the one who dies.

It was further said that it is not disputed that any person who, in doing or attempting to do an act which is unlawful and criminal, kills another, though not intending his or her death, is guilty of criminal homicide.

In *State v. Levelle*, 34 So. Car. 120 (1890), it was said that in the eye of the law self-destruction—suicide—is an offence, it is an unlawful act, and if a man with a deadly weapon undertakes to take his own life, he is doing an unlawful act, and if in the commission or attempted commission of that act he takes the life of an innocent party standing by, then, in the eye of the law, that is murder. In 1 *Russel on Crimes*, 424 (third Am. ed.), it is said: "Whenever an unlawful act, an act *malum in se*, is done in the prosecution of a felonious intention, and death ensues, it will be murder." Now, as suicide is an unlawful act, *malum in se*, and is a felony (1 *Bishop Cr. Law*, sec. 511-615), there can be no doubt that the proposition laid down in *State v. Levelle* is correct.

It is usually held, except where modified by statute as in Massachusetts, that the commission of mayhem on one's self, or attempt to commit suicide, is a misdemeanor, on the ground that one cannot consent to that which is a crime against the state. 1 *Bishop Cr. Law*, sec. 259-2—*U. S. v. Distillery*, 8 *Benedict*, 473 (1876). Now, if the completed act is not a crime how can the attempt to commit it or the partial commission of it be an offence? Yet such would be the consequence of holding that suicide is not a crime. There does not seem to be any difficulty in the case, in holding that suicide is an unlawful act when it results in some other crime and punishment is possible; therefore, the fact that it is unlawful should not be lost sight of merely because punishment is not possible. As is pointed out by *Bishop*, to hold thus would be to say that where one commits murder and dies there is no crime because no punishment is possible.

In *Grace v. State* the judge goes on and states that "there is no evidence showing that the prisoner placed the pistol on the dresser for the purpose or with the intent that deceased should use it in inflicting the fatal wound." If, as was previously stated in the same opinion, suicide is no crime, then it is certainly of no importance to discuss intent, because nothing short of actual use of the pistol by the appellant would have made him guilty. The learned judge does not seem to have been entirely satisfied with his own conclusion.

From the review of the authorities and the application of reason it can hardly be doubted that suicide is a crime at common law, hence, in the case under discussion, it would seem that if the prisoner intentionally assisted by furnishing means for, and was present at the time of, the suicide, he was a principal. But if, as was held in the latter part of the opinion, the evidence did not support the finding of guilty intent, then, however erroneous may have been the reasons given ultimate the decision seems correct.—*J. B. T., in American Law Register.*